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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 14

ALBERT BENJAMIN CHANDLER, INDIVIDUALLY AND AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY, ET AL., PETITIONERS,

vs.

JAMES W. WISE AND RAY B. MOSS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

PETITION FOR CERTIORARI FILED MARCH 30, 1938.

CERTIORARI GRANTED APRIL 11, 1938.

SUPREME COURT OF THE UNITED STATES

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[fol. 5]

IN CIRCUIT COURT OF FRANKLIN COUNTY

JAMES E. WISE and RAY B. Moss, Plaintiffs,

vs.

ALBERT BENJAMIN CHANDLER, Governor of the Commonwealth of Kentucky; Keen Johnson, Lieutenant Governor of the Commonwealth of Kentucky and President of the Senate of the General Assembly of Kentucky; Charles D. Arnett, Secretary of State of the Commonwealth of Kentucky; John Kirtley, Speaker of the House of Representatives of the General Assembly of Kentucky; William A. Perry, Chief Clerk of the Senate of the General Assembly of Kentucky; Brooks Hargrove, Chief Clerk of the House of Representatives of the General Assembly of Kentucky, Defendants

PETITION IN EQUITY—Filed January 15, 1937

The plaintiffs, James E. Wise and Ray B. Moss, state that the plaintiff, James E. Wise, is a citizen, resident, taxpayer and voter of Elizabethtown, Hardin County, [fol. 6] Kentucky; that the plaintiff, Ray B. Moss, is a citizen, resident, tax-payer and voter of Pineville, Bell County, Kentucky, and that the said plaintiffs bring this action as citizens and taxpayers of the Commonwealth of Kentucky and the United States of America against the defendants, Albert Benjamin Chandler, Keen Johnson, Charles D. Arnett, John Kirtley, William A. Perry and Brooks Hargrove, and allege as follows:

(1) The defendant, Albert Benjamin Chandler, is now and at all times herein mentioned has been the duly elected, qualified and acting Governor of the Commonwealth of Kentucky and said defendant is a citizen of the State of Kentucky and resides in Versailles, Woodford County, in said state.

(2) The defendant, Keen Johnson, is now and at all times herein mentioned has been the duly elected, qualified and acting Lieutenant Governor of the Commonwealth of Kentucky and, by virtue of that office, President of the Senate

of the General Assembly of Kentucky and that said defendant is a citizen of the Commonwealth of Kentucky and resides in Richmond, Madison County, in said state.

(3) The defendant, Charles D. Arnett, is now and at all times herein mentioned has been the duly elected, qualified and acting Secretary of State of the Commonwealth of [fol. 7] Kentucky and a citizen and resident of Louisville, Jefferson County, Kentucky.

(4) The defendant, John Kirtley, is now and at all times herein mentioned has been the duly elected, qualified and acting Speaker of the House of Representatives of the General Assembly of Kentucky and a citizen and resident of Island, McLean County, Kentucky.

(5) The defendant, William A. Perry, is now and at all times herein mentioned, has been the duly elected, qualified and acting Chief Clerk of the Senate of the General Assembly of Kentucky and said defendant is a citizen and resident of Louisville, Jefferson County, Kentucky.

(6) The defendant, Brooks Hargrove, is now and at all times herein mentioned has been the duly elected, qualified and acting Chief Clerk of the House of Representatives of the General Assembly of Kentucky and is a citizen and resident of Stanford, Lincoln County, Kentucky.

(7) On June 2, 1924, the sixty-eighth Congress of the United States proposed the following amendment to the Constitution of the United States:

"Section 1. The Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.

[fol. 8] "Section 2. The Power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

(8) On March 24, 1926, the General Assembly of the Commonwealth of Kentucky duly considered the aforesaid proposed so-called Child Labor Amendment to the Constitution of the United States and duly enacted the following concurrent resolution or act of the legislature of the Commonwealth of Kentucky:

"Be it resolved by the Senate of Kentucky, the House of Representatives concurring therein:

Sec. 1. That the said proposed Amendment to the Constitution of the United States of America be, and the same is hereby rejected by the General Assembly of the Commonwealth of Kentucky.

Sec. 2. That certified copies of this Concurrent Resolution be forwarded by the Governor of this Commonwealth to the Secretary of State in Washington, D. C., and to the Presiding Officer of the United States Senate and the Speaker of the House of Representatives of the United States."

[fol. 9] And pursuant to said authority certified copies of the above concurrent resolution were forwarded by the Governor of the said Commonwealth to the Secretary of State in Washington, D. C., and to the Presiding Officer of the United States Senate and to the Speaker of the House of Representatives of the United States.

(9) Prior to said March 24, 1926, the so-called Child Labor Amendment to the Constitution of the United States had been duly rejected by more than a majority of the legislatures of the states of the Union and for that reason prior even to the rejection of it by the Legislature of the Commonwealth of Kentucky the so-called Child Labor Amendment was finally and conclusively rejected and defeated.

(10) On December 23, 1936, the defendant, Albert Benjamin Chandler, as Governor of the Commonwealth of Kentucky, issued a proclamation stating that an emergency existed and convening the General Assembly of Kentucky in extraordinary session at Frankfort, Kentucky, for the purpose of considering certain subjects which did not include the subject of reconsidering the aforesaid proposed Child Labor Amendment to the Constitution of the United States.

[fol. 10] (11) On January 8, 1937, the defendant, Albert Benjamin Chandler, as Governor of the Commonwealth of Kentucky, did unlawfully issue an amendment to the aforesaid proclamation of December 23, 1936, which reads as follows:

"Whereas, Both houses of Congress of the United States by a constitution- majority of two-thirds thereof has

adopted a joint resolution proposing to amend the Constitution of the United States in such manner as to authorize Congress to limit, regulate and prohibit the labor of persons under eighteen years of age; and

"Whereas, the General Assembly of the Commonwealth of Kentucky should have an opportunity immediately to ratify the said amendment:

Now, Therefore, In order that the General Assembly may consider the ratification of said amendment according to the power vested in me by the Constitution of Kentucky I do issue this my proclamation amending the proclamation convening the General Assembly of Kentucky in extraordinary session at the seat of government in Frank-
[fol. 11] fort, Kentucky, at one o'clock P. M. on Wednesday, December 23, 1936, by adding the following item thereto:

"29—To enact a joint resolution ratifying the proposed amendment to the Constitution of the United States providing that Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.

"Given under my hand this the 8th day of January, 1937.

"By the Governor:

A. B. Chandler, Governor of Kentucky. Charles D. Arnett, Secretary of State."

(12) On January 12th, 1937, the Senate of the General Assembly of Kentucky by a vote of 19 to 14 unlawfully adopted a resolution purporting to ratify the proposed Child Labor Amendment to the Constitution of the United States. On January 13th, 1937, the House of Representatives of the General Assembly of Kentucky, by a vote of 59 to 24 unlawfully adopted the same resolution purporting to ratify the proposed Child Labor Amendment to the Constitution of the United States.

[fol. 12] (13) The aforesaid action of the Grand Assembly of Kentucky in attempting to revoke its previous action in rejecting the proposed Child Labor Amendment and in attempting to ratify said proposed amendments was and is unlawful and violative of the Constitution and laws of the United States and the Constitution and laws of the Commonwealth of Kentucky.

The General Assembly of Kentucky having duly rejected said proposed amendment, could not subsequent

thereto legally reconsider and adopt said proposed amendment without violating Article 5 of the Constitution of the United States and said action in attempting to reconsider and adopt said proposed amendment violated Article 5 of the Constitution of the United States because said action was not taken within a reasonable time after the amendment was proposed on June 2, 1924, by the Congress of the United States.

The defendant, Albert Benjamin Chandler, as Governor of the Commonwealth of Kentucky, had no authority to issue the aforesaid amended proclamation and said amended proclamation and the purported ratification pursuant thereto were and are unlawful and void.

(14) The defendants, Albert Benjamin Chandler, as Governor of the Commonwealth of Kentucky, Keen Johnson, as Lieutenant Governor of the Commonwealth of [fol. 13] Kentucky and as President of the Senate of the General Assembly of Kentucky, Charles D. Arnett, as Secretary of State of the Commonwealth of Kentucky, John Kirtley, as Speaker of the House of Representatives of the General Assembly of Kentucky, William A. Perry, as Chief Clerk of the Senate of the General Assembly of Kentucky, and Brooks Hargrove, as Chief Clerk of the House of Representatives of the General Assembly of Kentucky, and each of them are threatening and, unless restrained by this court will proceed to send certified copies of the aforesaid unlawful and void resolution purporting to ratify the proposed amendment to the Constitution of the United States to the Secretary of State of the United States in Washington and to the Presiding Officer of the United States Senate and to the Speaker of the House of Representatives of the United States, and the Secretary of State of the United States will by said notice be led to believe that said proposal has been ratified by the Legislature of Kentucky when in fact the action of the General Assembly of Kentucky in attempting to ratify said proposed amendment was and is unlawful and void.

(15) The plaintiffs are without adequate remedy at law in the premises and only by a suit of this nature and by the injunctive processes of this court can they be fully [fol. 14] protected, as citizens and taxpayers of the Commonwealth of Kentucky and United States of America, from the illegal and void action of the General Assembly

of Kentucky. Unless this court grants injunctive process as hereinafter prayed, these plaintiffs will each be irreparably damaged and the questions here involved can be adequately determined only in a suit of this nature.

(16) Plaintiffs state that no injunction against the acts complained of herein has been refused by this court or by any circuit judge. Plaintiffs state that irreparable injury will result to each of them from the delay of giving notice and that a temporary restraining order should be issued without notice and hearing.

Wherefore the plaintiffs pray for the following relief:

First, that the defendant, Albert Benjamin Chandler, as Governor of the Commonwealth of Kentucky, Keen Johnson, as Lieutenant Governor of the Commonwealth of Kentucky and as President of the Senate of the General Assembly of Kentucky, Charles D. Arnett, as Secretary of State of the Commonwealth of Kentucky, John Kirtley, as Speaker of the House of Representatives of the General Assembly of Kentucky, William A. Perry, as Chief Clerk [fol. 15] of the Senate of the General Assembly of Kentucky, and Brooks Hargrove, as Chief Clerk of the House of Representatives of the General Assembly of Kentucky, and each of them, be restrained and temporarily and permanently enjoined from sending certified copies of the aforesaid unlawful and void resolution purporting to ratify the proposed amendment to the Constitution of the United States to the Secretary of State of the United States in Washington, D. C., and to the Presiding Officer of the United States Senate and to the Speaker of the House of Representatives of the United States, or any of them; that the said defendants and each of them be restrained and temporarily and permanently enjoined from notifying in any manner the Secretary of State of the United States of the unlawful action of the General Assembly of Kentucky in attempting to ratify the proposed Child Labor Amendment.

Second, that the court adjudge and declare that the said action of the General Assembly of Kentucky in attempting to ratify the said proposed Child Labor Amendment violates the Constitution of the United States and the constitution of the State of Kentucky and that said action of the General Assembly is illegal and void.

Third, that the plaintiffs have all other relief to which [fol. 16] they may appear entitled.

Lafon Allen, Attorney for Plaintiffs. Oldham Clarke, Attorney for Plaintiffs.

Duly sworn to by J. E. Wise and Ray B. Moss. Jurat omitted in printing.

[fol. 17] In Circuit Court of Franklin County

Ordinary Summons

The Commonwealth of Kentucky to the Sheriff of Franklin County, Greeting:

You are commanded to summon Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, Keen Johnson, Lieutenant Governor of the Commonwealth of Kentucky and President of the Senate of the General Assembly of Kentucky, Charles D. Arnett, Secretary of State of the Commonwealth of Kentucky, John Kirtley, Speaker of the House of Representatives of the General Assembly of Kentucky, William A. Perry, Chief Clerk of the Senate of the General Assembly of Kentucky, Brooks Hargrove, Chief Clerk of the House of Representatives of the General Assembly of Kentucky to answer in 10 days after the service of the summons, a petition filed against them in the Franklin Circuit, by James E. Wise and Ray B. Moss and warn them that upon failure to answer, the petition will be taken for confessed or they will be proceeded against for contempt, and you will make due return of this summons within 10 days after the service thereof to the Clerk's Office of said Court.

Witness, Kelly C. Smither, Clerk of said Court, this 15th day of January, 1937.

Kelly C. Smither, Clerk, by Nell Sullivan, D. C.

[fol. 18] The Sheriff's return on the foregoing summons is in words and figures as follows:

Executed by delivering a true copy of the within summons to Keene Johnson, Charles D. Arnett, Secretary of State, John Kirtley, Speaker House, William A. Perry,

Clerk of Senate, Brooks Hargrove, Clerk of House, Governor A. B. Chandler not found.

This 15 day of January 1937.

G. Bain Moore, Sheriff Franklin County, by J. W. True, D. S.

[fol. 19] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

RESTRAINING ORDER—January 15, 1937

The Commonwealth of Kentucky to the Sheriff of Franklin County, Greetings:

The defendants, Albert Benjamin Chandler, as Governor of the Commonwealth of Kentucky, Keen Johnson, as Lieutenant Governor of the Commonwealth of Kentucky and as President of the Senate of the General Assembly of Kentucky, Charles D. Arnett, as Secretary of State of the Commonwealth of Kentucky, John Kirtley, as Speaker of the House of Representatives of the General Assembly of Kentucky, William A. Perry, as Chief Clerk of the Senate of the General Assembly of Kentucky and Brooks Hargrove, as Chief Clerk of the House of Representatives of the General Assembly of Kentucky, and each of them, be [fol. 20] and they are hereby restrained and prohibited from sending certified copies of the aforesaid unlawful and void resolution purporting to ratify the proposed amendment to the Constitution of the United States to the Secretary of State of the United States in Washington, D. C., and to the Presiding officer of the United States Senate and to the Speaker of the House of Representatives of the United States, or any of them; that the said defendants and each of them be restrained from notifying in any manner the Secretary of State of the United States of the unlawful action of the General Assembly of Kentucky in attempting to ratify the proposed Child Labor Amendment until the further order of the Court.

This restraining order is granted according to the prayer of plaintiffs' petition herein upon the execution of bond conditioned according to law and the penalty of $500.00 whereupon the said plaintiffs, with Fidelity & Deposit Company of Maryland as surety, executed bond to the defend-

ants as required by law which is approved and ordered to be filed.

Witness my hand as Clerk of said Court this the 15th day of January, 1937.

Kelly C. Smither, Clerk Franklin Circuit Court.

[fol. 21] The Sheriff's return on the foregoing Restraining Order is in words and figures as follows:

Executed this 15th day January 1937 by delivering a true copy of the within order to: Lieut. Gov. Keene Johnson, Chas. D. Arnett, Sec. State, John Kirtley, Speaker of House, William A. Perry, Clerk of Senate, Brooks Hargrove, Clerk of House, Gov. A. B. Chandler not found in Franklin County.

G. Bain Moore, S.F.C., by J. W. True, D. S.

[fol. 22] In Circuit Court of Franklin County

[Title omitted]

Amended Petition in Equity—Filed February 20, 1937

Come plaintiffs and, before answer filed, amend their petition herein and say as follows:

(1) For amendment of paragraph (9) of the original petition, they say that up to and including March 24 ,1926, the ratification of the so-called Child Labor Amendment to the Constitution of the United States had been refused by the legislatures of 38 states, to-wit, Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South [fol. 23] Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.

In the year 1927 the legislature of the State of Maryland also refused to ratify said amendment. During the same period from June 2, 1924, when said amendment was proposed by the Congress of the United States, to the end of the year 1927, five states had ratified said amendment, to-wit, Arizona, Arkansas, California, Montana (attempting to reverse its former action) and Wisconsin. Thus at the end

of the year 1927, which was three and a half years after the proposal of the said amendment by the Congress of the United States, the count stood 5 states for ratification and 37 states against ratification. In 1931 the legislature of the State of Colorado ratified said amendment, thus bringing the total number of ratifications up to 6 and bringing the rejections down to 36.

Thus the count stood until the year 1933, when an endeavor, originated and carried on by high officials of the Federal Government, was inaugurated to secure ratification by states that had not then acted on the question and a reconsideration of the subject by states which had theretofore rejected the amendment. The result of this endeavor has been that 16 states which had formerly rejected the amend-
[fol. 24] ment have now attempted to revoke their former action and to ratify it, to-wit, Idaho, Indiana, Iowa, Maine, Michigan, Minnesota, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Utah, Washington, West Virginia and Wyoming. In addition to this, 2 states, which had not theretofore acted upon the subject, also ratified the amendment, to-wit, Illinois and New Jersey. During this latter period, 2 states which had not theretofore acted upon the subject considered it and refused to ratify, to-wit, New York and Rhode Island. During the same period, 23 states which had theretofore rejected the amendment, reconsidered the subject and again rejected it, some of them more than once, to-wit, Connecticut, Delaware, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Mexico, New York, North Carolina, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont and Virginia. It thus appears that during the period following January 1, 1933, to date 39 states which had previously refused to ratify have reconsidered the subject, with the result that 16 of them have attempted to revoke their former action and to ratify said amendment and 23 have adhered to their former action rejecting the amendment.

[fol. 25] (2) Since the filing of the original petition in this action at 8:30 o'clock a. m. on Friday, January 15, 1937, certain transactions have taken place, hereinafter set forth, upon which plaintiffs rely as supporting their prayer for additional interlocutory relief, not prayed for in their original petition.

The original petition in this case was filed in the office of the Clerk of the Franklin Circuit Court at 8:30 a. m. on Friday, January 15, 1937. The Judge of that Court being absent from the county, application was made to the Clerk for the issuance of a restraining order in accordance with the prayer of the petition. The requisite bond was given and at 8:45 o'clock on that morning a restraining order was issued by the Clerk, which is a part of this record. Thereupon summons addressed to each of the defendants and attested copies of the said restraining order were placed in the hands of the Sheriff of Franklin County and by him given into the hands of two of his deputies for immediate service. At 9:05 o'clock on said morning the said deputies left the Sheriff's office with said papers and proceeded by automobile to the State Capitol for the purpose of serving same, having been instructed by the Sheriff to make the first service, if possible, upon the defendant, Albert Benjamin [fol. 26] Chandler, Governor of the Commonwealth of Kentucky. The deputy sheriff charged with the duty of serving the last mentioned defendant went at once to the Governor's office but was denied admittance to him and was unable to serve him with the papers aforesaid although he continuously endeavored to get access to the said defendant for that purpose. Despite the endeavors of said deputy sheriff to perform his duty, he was not able to make service upon said defendant until the hour of — on Friday, January 15, 1937, at which time, as was reported in an Associated Press dispatch appearing in the afternoon papers of that day, the said defendant, Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, stated he had theretofore on that day forwarded to the Secretary of State of the United States at Washington, by registered mail, a certified copy of the purported resolution of ratification adopted by the General Assembly of Kentucky, without knowledge on his part that the original petition in this action had been filed. These plaintiffs are informed and believe and, therefore, say that at the time when the said deputy sheriffs first reached the Capitol and endeavored to obtain service upon said defendant, Albert Benjamin Chandler, he had not then forwarded certified copies of said purported resolution of ratification to the Secretary of State of the United States. [fol. 27] Plaintiffs further allege that, when the said defendant, Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, was served with summons in this

action and with the restraining order hereinabove referred to, no notice of the purported ratification by the General Assembly of said Child Labor Amendment had been given to the Secretary of State of the United States or to any other Federal officer, that the said defendant could at that time have advised the Secretary of State of the United States of the pendency of this action, challenging the validity of said purported ratification and under the order of this court it was his duty to have done so and to have notified the Secretary of State that he had been restrained from giving him notice in any manner of said purported ratification. Plaintiffs say that the failure of said defendant, Albert Benjamin Chandler, after having been served with the restraining order aforesaid, to have so notified the Secretary of State of the United States of the pendency of this action and of the order which had been served upon him, was in itself a violation of said order.

Wherefore plaintiffs pray as in their original petition and further pray for a mandatory injunction requiring the [fol. 28] defendant, Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, to notify forthwith the Secretary of State of the United States by registered mail that before sending attested copies of the purported resolution of ratification to the Secretary of State of the United States, the validity of that resolution as an act of ratification of said amendment had been challenged in this proceeding, that prior to the receipt of said copies by the said Secretary of State of the United States he had been restrained by order of this court from giving notice to the Secretary of State of the United States in any manner and that any notice given in violation of said restraining order was and is null and void.

Lafon Allen, Oldham Clarke, Attorneys for Plaintiffs.

Duly sworn to by J. E. Wise. Jurat omitted in printing.

[fol. 29] In Circuit Court of Franklin County

[Title omitted]

Second Amended Petition in Equity—Filed February 20, 1937

Come plaintiffs, James E. Wise and Ray B. Moss, and for further amendment to their petition in equity herein state as follows:

(1) Plaintiffs, James E. Wise and Ray B. Moss, are now and were at all times herein mentioned duly elected, qualified and acting members of the Senate of the General Assembly of Kentucky and were present in the Senate on January 12, 1937, and each of said plaintiffs duly voted against the adoption of the resolution purporting to ratify the proposed Child Labor Amendment to the Constitution of the United States.

[fol. 30] (2) Plaintiffs say that the following is a list of the notifications filed with the Department of State of the United States, certifying the affirmative rejection of the so-called Child Labor Amendment by both houses of the Legislature of the respective states listed below.

In the left hand column are the dates upon which such certifications were received by the Department of State in Washington.

In the right-hand column are the dates upon which the proposed Amendment was rejected by the respective state legislatures.

Date of Receipt of Notification by Department of State		Date of Rejection by State Legislation
	Connecticut	
February 18, 1925	Senate	February 3, 1925
	House	February 11, 1925
	Delaware	
February 5, 1925	Senate	February 2, 1925
February 20, 1925	House	January 28, 1925
	Florida	
March 19, 1926	Rejected by Resolution	May 14, 1925
	Georgia	
December 26, 1924	Rejected by Resolution	August 6, 1924
	Indiana	
April 9, 1925	Senate	February 5, 1925
	House	March 5, 1925
[fol. 31]	Kansas	
February 2, 1925	Rejected by Resolution	January 27, 1925
	"Approved"	January 30, 1925
	Kentucky	
November 15, 1926	Rejected by Resolution	March 24, 1926

Date of Receipt of Notification by Department of State		Date of Rejection by State Legislation
	Maine	
September 8, 1925	Rejected by Resolution	April 10, 1925
	Maryland	
March 21, 1927	Rejected by Resolution	March 18, 1927
	Massachusetts	
March 2, 1925	Senate Resolution Rejecting	
November 10, 1933	House Resolution Rejecting	February 16, 1925
		February 19, 1925
	Minnesota	
May 19, 1925	Rejected by Resolution	April 14, 1925
	Missouri	
March 26, 1925	Rejected by Resolution	March 20, 1925
	New Hampshire	
March 28, 1925	Rejected by Resolution	March 28, 1925
	North Carolina	
November 22, 1924	Rejected by Resolution	August 23, 1924
	Pennsylvania	
May 23, 1925	Rejected by Resolution	April 16, 1925
	South Carolina	
February 21, 1925	Rejected by Resolution	January 27, 1925
	Tennessee	
February 11, 1925	Rejected by Resolution	[January 27, 1925]* February 4, 1925
	Texas	
March 2, 1925	Rejected by Resolution "Approved"	January 27, 1925 February 2, 1925.
[fol. 32]	Utah	
February 12, 1925	Rejected by Resolution	February 4, 1925
	Vermont	
February 28, 1925	Rejected by Resolution	February 26, 1925
	Virginia	
March 3, 1925	Rejected by Resolution	January 22, 1926

*[Matter enclosed in brackets, struck out in copy.]

Plaintiffs say that the foregoing facts are taken from a "Memorandum", prepared and furnished by the Depart-

ment of State of the United States at Washington, D. C., under date of December 19, 1936, a copy of which is attached hereto as an exhibit, marked 'Plaintiffs' Exhibit 1". They say that the facts stated therein are true.

Plaintiffs say that said "Memorandum" further shows, and it is true, that in February, 1925, the Legislature of South Dakota rejected a resolution of ratification of said proposed Amendment, by the action of both houses, and a certificate of said rejection was received by the Secretary of State of the United States on March 2, 1925.

Furthermore, the proposed Amendment was affirmatively rejected by resolution of both Houses of the Legislatures of the following States, on the dates given, although said action was not certified to the Secretary of State of the United States, to-wit:

[fol. 33] Mississippi:

Senate: February 13, 1936.
House: March 3, 1936.

Nebraska:

Both Houses: March 25, 1925.

New Mexico:

Both Houses: February 4, 1935.

Oklahoma:

Both Houses: January 27, 1925.

Washington:

Both Houses: January 29, 1925.

West Virginia:

Both Houses: April 7, 1925.

The foregoing tables show that, within two and a half years after the said amendment had been proposed by the Congress of the United States on June 2, 1924, twenty-four states, by the action of both Houses of their respective Legislatures, had by affirmative action rejected said proposed Amendment and that the action of twenty of said States had been duly certified to the Secretary of State of

the United States. It further shows that there had been certified to the Secretary of State the action of one State Legislature (South Dakota) in defeating, in both Houses, a resolution of ratification. Stated in tabular form, said rejections are as follows:

During the Year 1924:

Connecticut—Certified August, 1924.
North Carolina—Certified August, 1924.

[fol. 34] During the Year 1925:

Connecticut—Certified February, 1925.
Deleware—Certified January and February, 1925.
Florida—Certified May, 1925.
Indiana—Certified February and March, 1925.
Kansas—Certified June, 1925.
Maine—Certified April, 1925.
Massachusetts—Certified February, 1925.
Minnesota—Certified April, 1925.
Missouri—Certified March, 1925.
New Hampshire—Certified March, 1925.
Pennsylvania—Certified April, 1925.
South Carolina—Certified January, 1925.
Tennessee—Certified February, 1925.
Texas—Certified January, 1925.
Utah—Certified February, 1925.
Vermont—Certified February, 1925.
Nebraska—Rejected March, 1925; nor certified.
Oklahoma—Rejected January, 1925; not certified.
Washington—Rejected January, 1925; not certified.
West Virginia—Rejected April, 1925; not certified.
South Dakota—Ratification defeated in both houses February, 1925; certified March, 1925.

[fol. 35] During the Year 1926:

Kentucky—Certified March, 1926.
Virginia— Certified January, 1926.

During the Year 1927:

Maryland—Certified March, 1927.

Plaintiffs further say that, in addition to the adverse action of the States mentioned above, the said proposed

Amendment was rejected by the action of one House of the Legislature of each of the following States, on the dates given:

Colorado—Rejected by one House April 1, 1925.
Michigan—Rejected by one House February 20, 1925.
Nevada—Rejected by one House February 3, 1925.
Ohio—Rejected by one House January 27, 1925.
Oregon—Rejected by one House February 16, 1925.
Wyoming—Rejected by one House January 19, 1925.

It thus appears that with the rejection of the amendment by the Legislature of Maryland in March 1927, thirty-two States had rejected the proposed Amendment in one or other of the ways above described.

(3) The original petition herein was duly filed with the Clerk of the Franklin Circuit Court on January 15, 1937, at 8:30 o'clock a.m. and, the Judge of this court being [fol. 36] absent from the county, application was duly made to the Clerk for the issuance of a restraining order in accordance with the prayer of the petition. Immediately upon the filing of said petition, the Clerk duly issued the restraining order. After said petition was duly filed and the restraining order duly issued, the defendant, A. B. Chandler, wrote and mailed the following letter to the Hon. Cordell Hull, Secretary of State, Washington, D. C.:

MY DEAR MR. SECRETARY: "Jan. 15, 1937.

You will find enclosed herewith certified joint resolution passed by the General Assembly of Kentucky—ratifying the Child Labor Amendment.

A. B. Chandler, Governor of Kentucky."

The defendant, A. B. Chandler, inclosed with this letter copy of said joint resolution, a true and accurate copy of which is filed herewith as a part hereof and marked "Plaintiffs' Exhibit 2".

[fol. 37] On said January 15, 1937, defendant, A. B. Chandler, was duly notified of the pendency of this suit and the issuance of the restraining order and duly served with summons and attested copy of said restraining order.

On January 18, 1937, at 10:41 a.m., the Secretary of State of the United States at Washington received the aforementioned letter of January 15, 1937, from the defendant, A. B. Chandler.

Wherefore, plaintiffs pray as in their original petition as amended and further for a mandatory injunction requiring defendant, Albert Benjamin Chandler, individually and as Governor of the Commonwealth of Kentucky, and defendant, Charles D. Arnett, individually and as Secretary of State of the Commonwealth of Kentucky, to notify the Secretary of State of the United States that the resolution of the two Houses of the General Assembly of the Commonwealth of Kentucky, theretofore certified by them to the Secretary of State of the United States, was void and of no effect and for all other relief to which they may appear entitled.

Lafon Allen, Oldham Clarke, Attorneys for Plaintiffs.

[fol. 38] *Duly sworn to by Lafon Allen. Jurat omitted in printing.*

[fol. 39] EXHIBIT 1 TO 2ND AMENDED PETITION

DEPARTMENT OF STATE

December 19, 1936.

Memorandum

The Child Labor Amendment

By joint resolution of Congress of June 2, 1924, the following amendment to the Constitution of the United States (commonly known as the Child Labor Amendment) was proposed:

"Article —

"Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

"Sec. 2. The power of the several States is unimpaired by this Article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

[fol. 40] The records of the Department of State show action taken on the proposed amendment of the Legislatures of the respective States as follows:

		Date of receipt of notification by the Department
Alabama	No record of action.	
Arizona	Ratification by Resolution of January 28, 1925, approved January 29, 1925.	February 4, 1925
Arkansas	Ratification by resolution approved June 28, 1924.	July 2, 1924
California	Ratification by resolution of January 8, 1925.	March 5, 1925
Colorado	Ratification by resolution filed in the Office of the Secretary of State of Colorado on April 28, 1931.	May 2, 1931
Connecticut	Joint Resolution of Congress proposing the amendment rejected in the Senate of Connecticut, February 3, 1925, and in the House of Representatives of Connecticut February 11, 1925.	February 18, 1925
Delaware	Resolution proposing ratification of proposed amendment rejected in the House of Representatives of Delaware by 32 votes to none, 3 absent, January 28, 1925.	February 20, 1925
	Resolution proposing ratification of proposed amendment rejected in the Senate of Delaware by 17 votes to none. February 2, 1925.	February 5, 1925
Florida	Rejection by resolution filed in the Office of the Secretary of State of Florida on May 14, 1925.	March 19, 1926
Georgia	Rejected by resolution approved August 6, 1924.	December 15, 1924
[fol. 41]		
Idaho	Resolution proposing ratification of the proposed amendment was lost in the House of Representatives of Idaho on February 7, 1925, by a vote of 18 ayes, 38 nays, with 6 absent.	March 24, 1925
	Ratification by resolution of February 7, 1935.	February 18, 1935

		Date of receipt of notification by the Department
Illinois	Ratification by resolution of June 30, 1933.	August 21, 1933
Indiana	In the Senate of Indiana on February 5, 1925, the joint Resolution of Congress proposing the amendment was "indefinitely postponed and rejected" by a vote of 32 ayes, 16 noes. In the House of Representatives of Indiana on March 5, 1925, a motion that the Joint Resolution of Congress proposing the amendment be rejected "prevailed."	April 9, 1925
Iowa	Ratification by resolution.	February 21, 1935
	On March 11, 1925, the House of Representatives of Iowa "indefinitely postponed House Joint Resolution No. 2" which had for its purpose the ratification of the proposed amendment to the Constitution of the United States.	March 13, 1925
	Ratification by resolution on December 5, 1933.	December 21, 1933
Kansas	Rejected by resolution of January 27, 1925, approved January 30, 1925.	February 2, 1925
Kentucky	Rejection by resolution approved March 24, 1926.	November 15, 1926
Louisiana	Resolution of ratification of the proposed amendment rejected in the House of Representatives of Louisiana on June 27, 1924, by yeas 23, nays 55, absent 21. No action taken by the Senate of Louisiana.	February 12, 1925
[fol. 42]		
Maine	Rejection by resolve of April 10, 1925.	September 8, 1925
	Ratification by Resolve of December 16, 1933, approved December 16, 1933.	December 21, 1933
Maryland	Rejection by resolution approved March 18, 1927.	

		Date of receipt of notification by the Department
Massachusetts	Act of the Commonwealth of Massachusetts approved June 5, 1924, placing "upon the ballot to be used at the biennial State election in the current year the following question: Is it desirable that the general court ratify the following proposed amendment to the Constitution of the United States."	June 11, 1924
	The Senate of Massachusetts on February 16, 1925, rejected the proposed amendment by a vote of 33 yeas to 1 nay	March 2, 1925
	The House of Representatives of Massachusetts, on February 19, 1925, adopted by a vote of 204 yeas to 9 nays resolutions rejecting the proposed amendment.	November 10, 1933
Michigan	Ratification by resolution of May 10, 1933.	May 17, 1933
Minnesota	Rejection by resolution of April 14, 1925.	April 17, 1925
	Ratification by resolution of December 14, 1933, approved December 14, 1933.	December 18, 1933
Mississippi. [fol. 43]	No record of action.	
Missouri	Rejection by resolution of March 20, 1925.	March 26, 1925
Montana	Ratification by resolution approved February 11, 1927.	February 15, 1927
Nebraska	No record of action.	
Nevada	No record of action.	
New Hampshire	Rejection by resolution of March 18, 1925.	March 28, 1925
	Ratification by resolution of May 17, 1933.	May 23, 1933
New Jersey	Ratification by resolution of June 12, 1933.	June 15, 1933
New Mexico	No record of action.	
New York	No record of action.	
North Carolina	Rejection by resolution of	November 22, 1924

		Date of receipt of notification by the Department
North Dakota	Certificate dated January 28, 1925, that the Senate of North Dakota, by vote of 32 to 17, resolved not to ratify the proposed amendment to the Constitution.	January 31, 1925
	Ratification by resolution filed in the Office of the Secretary of State of North Dakota on March 4, 1933.	August 17, 1933
Ohio	Ratification by resolution of March 22, 1933.	May 31, 1933
Oklahoma	Ratification by resolution of July 5, 1933	July 13, 1933
Oregon	Ratification by resolution of January 31, 1933.	July 12, 1933
Pennsylvania	Rejection by resolution of April 16, 1925.	May 23, 1925
	Ratification by resolution of December 21, 1933.	May 25, 1934
[fol. 44]		
Rhode Island	No record of action.	
South Carolina	Rejected by resolution of January 27, 1925.	February 21, 1925
South Dakota	Certificate dated February 24, 1925, that the proposed amendment to the Constitution of the United States, having been duly proposed by a Joint Resolution in the Senate and the House of Representatives of South Dakota during its 19th Legislative Session "failed of passage." In the Senate of South Dakota the vote was: Yes, 5; No, 36; Absent and not voting, 1; Excused 3. In the House of Representatives of South Dakota the vote was: Yes, 26; No, 73; Absent and not voting, 1; Excused, 3.	March 2, 1925
	The South Dakota Legislature again rejected the proposed amendment to the Constitution of the United States at its Special Session which	March 17, 1934

		Date of receipt of notification by the Department
	convened July 31, 1933. This was by House Resolution No. 1, the vote being: Yes, 43; No, 48; Absent and not voting, 11; Excused, 1.	
Tennessee	Rejection by resolution of February 4, 1925.	February 11, 1925
Texas	Rejection by resolution of January 27, 1925, approved February 2, 1925.	March 2, 1925
Utah	Rejection by resolution of February 4, 1925.	February 12, 1925
	Ratification by resolution of February 5, 1935.	February 11, 1935
Vermont	Rejection by resolution certified February 26, 1925.	February 28, 1925
Virginia	Rejection by resolution of January 22, 1926.	March 3, 1926
[fol. 45]		
Washington	Ratification by resolution of February 3, 1933.	May 24, 1933
West Virginia	Ratification by resolution of December 12, 1933.	January 8, 1934
Wisconsin	Ratification by resolution filed in the office of the Secretary of State of Wisconsin, February 25, 1925.	February 28, 1925
Wyoming	Ratification by resolution of January 31, 1935, approved February 1, 1935.	March 2, 1935

[fol. 46] EXHIBIT 2 TO 2ND AMENDED PETITION

Senate Resolution No. 12

A Joint Resolution ratifying the proposed amendment to the Constitution of the United States to authorize Congress to limit, regulate and prohibit the labor of persons under eighteen years of age.

Whereas, Both Houses of the Congress of the United States of America by a constitutional majority of two-thirds thereof made the following proposition to amend the

Constitution of the United States of America, in the following words, to-wit:

"Joint Resolution, proposing to amend the Constitution relating to the limiting, regulation and prohibition of the labor of persons under 18 years of age:

"Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled—

"Two-thirds of each House concurring therein, that the following Article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution, when ratified by the Legislature of three-fourths of the several states.

"Section 1. That Congress shall have power to limit, regulate and prohibit the labor of persons under 18 years of age.

"Section 2. The power of the several States is unim- [fol. 47] paired by this Article, except that the operation of the State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress therefore."

Be it Resolved by the General Assembly of the Commonwealth of Kentucky:

Section 1. That the foregoing and above recited amendment to the Constitution of the United States of America be and the same is hereby ratified by the General Assembly of the Commonwealth (State) of Kentucky as an amendment to the Constitution of the United States.

Section 2. That the Governor of the Commonwealth of Kentucky forthwith forward to the Secretary of State of the United States an authenticated copy of the foregoing Joint Resolution.

Keen Johnson, President of the Senate. John Kirtley, Speaker of the House.

This resolution is hereby approved—

A. B. Chandler, Governor of Kentucky.

[fol. 48] COMMONWEALTH OF KENTUCKY

Office of the Secretary of State

Certificate

I, Charles D. Arnett, Secretary of State for the Commonwealth of Kentucky, do certify that the foregoing writing

has been carefully compared by me with the original record thereof, now in my official custody Attorney General found to be a true and correct copy of

Senate Resolution No. 12, approved by Governor A. B. Chandler (no date) and received in the office of Secretary of State, January 15, 1937.

In Witness Whereof, I have hereunto set my hand and affixed my official seal.

Done at Frankfort this 2 day of March, 1937.

Chas. D. Arnett, Secretary of State. (Seal.)

[fol. 49] In Circuit Court of Franklin County

[Title omitted]

General Demurrer to Petition and Amended Petitions—Filed February 20, 1937

Come the defendants, Albert Benjamin Chandler, Governor, etc., et al., and demur generally to the petition and amended petition and second amended petition filed herein because neither said petition nor amended petition nor second amended petition state facts sufficient to constitute a cause of action against these defendants.

Wherefore, defendants pray judgment on their demurrer.

B. M. Vincent, Attorney General. J. J. Leary, J. W. Jones, Asst. Atty. Gen. Guy H. Herdman, Assistant Attorney General for Defendants.

[fol. 50] In Circuit Court of Franklin County

[Title omitted]

Order as to Answer, etc.—February 20, 1937

Come the defendants by Attorney and file their motion to dissolve and set aside the restraining order issued by the Clerk herein, and also file general demurrer to the petition and amended petition and second amended petition and upon motion of said defendants it is further ordered that the verified joint and separate answer of the defendants be filed, and that same be considered as the affidavit of defendants on

plaintiffs' motion for an injunction. The filing of said answer is without waiving or prejudice to the general demurrer to the petition and amended petition and second amended petition heretofore filed.

[fol. 51] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

MOTION TO DISSOLVE RESTRAINING ORDER—Filed February 20, 1937

Come the defendants herein, Albert Benjamin Chandler, Governor, etc., et al., and move the Court to discharge the restraining order issued herein by the Clerk, and for cause say that before the suit was instituted the Resolution ratifying the proposed Child Labor Amendment to the Federal Constitution had been duly and properly adopted by both the Senate and House of the Kentucky General Assembly, and approved by the Governor, and that the Governor had at the time of service of the restraining order issued by the Clerk and without knowledge of said action, certified and mailed same to the Secretary of State of the United States [fol. 52] at Washington, D. C., and that said restraining order issued by said Clerk was thereby inoperative, futile and of no effect, and that said restraining order prayed in the amended petition is mandatory in character and beyond the power of the Clerk to issue, and that the order issued on the original petition cannot be extended to the amended petition, and that said restraining order should be discharged, dissolved and set aside.

Wherefore, defendants pray judgment on their motion herein.

B. M. Vincent, Attorney General. J. J. Leary, J. W. Jones, Asst. Atty. Gen. Guy H. Herdman, Assistant Attorney General for Defendants.

[fol. 53] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

APPLICATION FOR INJUNCTION—Filed February 20, 1937

Come plaintiffs, James E. Wise and Ray B. Moss, and move the court for a temporary injunction in lieu of the

restraining order heretofore issued in this case and that a writ of temporary injunction issue out of and under the seal of this court and that said writ shall be and remain in full force and virtue until further order of the court in the premises.

Lafon Allen, Oldham Clarke, Attorneys for Plaintiffs.

[fol. 54] IN CIRCUIT COURT OF FRANKLIN COUNTY

#36715

JAMES E. WISE and RAY B. MOSS, Plaintiffs,

vs.

ALBERT BENJAMIN CHANDLER, Individually and as Governor of the Commonwealth of Kentucky, et al., Defendants

JUDGMENT

This action came on for hearing upon the defendants' general demurrer to the plaintiffs' petition as amended, defendants' motion to dissolve the Restraining Order, and upon plaintiff's application for a temporary injunction, pursuant to plaintiffs' verified petition as amended, and the Court having heard argument of counsel for the respective parties and being sufficiently advised in the premises,

It is Ordered, Adjudged and decided as follows:

[fol. 55] I

(1) Defendants' demurrer to plaintiffs' petition as amended is hereby sustained, upon the ground that the facts alleged are not sufficient to constitute a cause of action.

The cause of action coming on further to be heard, the plaintiffs decline to plead further herein and their petition as amended is hereby dismissed.

(2) Defendants' motion to dissolve the restraining order, which was duly issued by the Clerk of this Court on January 15, 1937, is sustained and said restraining order is hereby vacated and set aside.

(3) Plaintiffs' application for a temporary injunction is hereby denied.

The plaintiffs and each of them object and except to each of the foregoing rulings of the Court and pray an appeal to the Court of Appeals, which is hereby granted.

II

It is further ordered, adjudged and decreed that, upon terms that the plaintiffs shall within twenty days from the entry of this judgment take and perfect an appeal to the Court of Appeals and execute and file a bond conditioned according to law in the penalty of $500, an injunction pend-
[fol. 56] ing said appeal shall be and hereby is allowed, in terms prayed for in plaintiffs' original petition herein, to prevent the defendants or any of them from taking any action which would in any manner change the status existing immediately before the entry of this judgment. To which the defendants object and except.

March 2, 1937.

W. B. Ardery, Judge.

[fols. 57-58] In Court of Appeals of Kentucky, Fall Term
October 1, 1937

James E. Wise et al., Appellant,

Against

Albert Benjamin Chandler, Individually and as Governor of the Commonwealth of Kentucky, et al., Appellee

Appeal from a Judgment of the Franklin Circuit Court

Mandate

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, and cause remanded, with directions to overrule the demurrer to the petition and such further proceedings as are not inconsistent with the views herein; which is ordered to be certified to said Court. Whole Court Sitting.

A copy—Attest:

Chas. K. O'Connell, C. C. A., By Alice Griffin, D. C.

Issued 11-6-1937.

[fol. 59] IN CIRCUIT COURT OF FRANKLIN COUNTY

#36715

JAMES E. WISE and RAY B. MOSS, Plaintiffs

vs.

ALBERT BENJAMIN CHANDLER, Individually and as Governor of the Commonwealth of Kentucky, et al., Defendants

ORDER FILING MANDATE AND OPINION OF THE COURT OF APPEALS AND JUDGMENT IN ACCORDANCE THEREWITH—December 6, 1937

Come the plaintiffs, by counsel, and tender a true copy of the opinion of the Court of Appeals, in this action handed down October 1, 1937, and the mandate of the Court of Appeals herein, attested by the Clerk of said Court, the mandatory part of which reads as follows:

"The court being sufficiently advised, it seems to them the judgment is erroneous.

"It is therefore considered that said judgment be reversed, and cause remanded, with directions to overrule the demurrer to the petition and such further proceedings as are not inconsistent with the views herein."

[fol. 60] The copies of said opinion and mandate so tendered, are ordered filed and made parts hereof, marked "Exhibit A" and "Exhibit B", respectively.

I

It is Therefore Ordered, Adjudged and Decreed that, Defendants' demurrer to plaintiffs' petition as amended is hereby overruled.

II

The cause coming on further to be heard, the defendants decline to plead further and, it appearing to the court that the importance of this controversy to the State requires a decision upon the merits, it is therefore:

Ordered, Adjudged and Decreed as follows:

(1) An actual controversy exists between the parties to this action, the plaintiffs have the right to maintain the suit and the court has jurisdiction of this cause.

(2) The resolution of the Legislature of Kentucky adopted January 13, 1937, purporting to ratify the proposed amendment to the Constitution of the United States giving to the Congress the power to limit, regulate, and prohibit [fol. 61] the labor of persons under eighteen years of age, which amendment was proposed by the Congress on June 2, 1924, was and is invalid and void, and the said proposed amendment to the Constitution of the United States was not thereby ratified by the Legislature of Kentucky according to the provisions of the Constitution of the United States.

(3) The notice given by the defendant, the Hon. Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, by letter dated January 15, 1937, to the Hon. Cordell Hull, Secretary of State of the United States, and is of no effect.

(4) The Clerk of this Court is hereby directed to give official notice to the Department of State of the United States that the resolution of the Legislature of Kentucky, purporting to ratify the said proposed amendment to the Constitution of the United States, was and is invalid; that the proposed Amendment has not been ratified by the Legislature of Kentucky according to the provisions of the Constitution of the United States, and the notice given by the defendant, Hon. Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, by letter dated January 15, 1937, to the Hon. Cordell Hull, Secretary of State of the United States, was and is of no effect. The Clerk of this [fol. 62] Court if further directed to send a duly authenticated copy of this judgment to the Secretary of State of the United States, Department of State, Washington, D. C., by registered mail, with return receipt requested to be filed herein.

To all of which the defendants, and each of them, object and except, and pray an appeal to the Court of Appeals, which is granted.

December 6, 1937. W. B. Ardery, Judge.

Have Seen:

Lafon Allen, Oldham Clarke, Attorneys for Plaintiff.
Hubert Meredith, Attorney General, by J. W. J. Jones, Assistant Attorney General, Attorneys for Defendants.

[fol. 63] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed December 6, 1937

To the Clerk of the Franklin Circuit Court:

You are hereby requested to make a transcript of the record filed in the Court of Appeals of Kentucky pursuant to an appeal allowed in the above styled action and to include in such transcript of record the following, and no other, papers and exhibits, to-wit:

(1) Petition in equity;
(2) Restraining order;
(3) Amended petition in equity;
(4) Second amended petition in equity and exhibits;
(5) Defendants' general demurrer to petition as amended;
[fol. 64] (6) Defendants' motion to dissolve restraining order;
(7) Application for injunction;
(8) Judgment of March 2, 1937;
(9) Judgment of December 6, 1937 and exhibits;
(10) This schedule;

Said transcript is to be prepared as required by law and the Rules of the Court of Appeals of Kentucky for filing with the Clerk of the Court of Appeals.

Lafon Allen, Oldham Clarke, Attorneys for Plaintiffs.
Hubert Meredith, Atty. Gen., by J. W. J., J. W. Jones, Asst. Atty. Gen., Attorneys for Defendants.

Dec. 6, 1937.

[fol. 65] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 66-67] Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

[fol. 68] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

STATEMENT ON APPEAL—Filed December 17, 1937

(1) The names of the parties to this appeal are as stated in the above caption.

(2) The judgment appealed from was rendered by the Franklin Circuit Court on December 6th, 1937, and may be found on page 49 of the transcript of the record herein.

[fol. 69] (3) The appeal was granted below and no summons or warning order is desired.

(4) The names and addresses of counsel for the appellees are as foflows:

Lafon Allen and Oldham Clark both of Louisville, Kentucky.

(Signed) Hubert Meredith, Attorney. General;
(Signed) J. W. Jones, Asst. Atty. Gen., Attorneys for Appellants.

[File endorsement omitted.]

[fol. 70] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER OF SUBMISSION—December 17, 1937

Came parties, by counsel, and filed joint motion to docket, advance and submit, which motion is sustained and case ordered docketed for the present term, advanced for hearing and submitted.

[fol. 71] IN COURT OF APPEALS OF KENTUCKY

ALBERT CHANDLER, Individually, etc. et al., Appellants,

vs.

JAMES E. WISE, et al., Appellees

Appeal from a Judgment of the Franklin Circuit Court

JUDGMENT—December 17, 1937

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment herein be affirmed; which is ordered to be certified to said court. Whole court sitting.

It is further considered that the appellees recover of the appellants, their costs herein expended.

[fols. 72-74] IN COURT OF APPEALS OF KENTUCKY

ALBERT BENJAMIN CHANDLER, etc., et al., Appellants,

v.

JAMES E. WISE and RAY B. MOSS, Appellees

Appeal from the Franklin Circuit Court

OPINION PER CURIAM—December 17, 1937

This case was before this court on a demurrer to the petition. Wise v. Chandler, 270 Ky. 1, 108 S. W. (2d) 1024. The judgment of the circuit court sustaining the demurrer was reversed for the reasons set out in that opinion. Upon the return of the case to the circuit court the defendants (now appellants) declined to plead further, and judgment was entered in conformity with the opinion of this court. No new issue or additional question is presented on this appeal, and the court has not changed its view on any of the questions formerly presented, including those raised under the Federal Constitution.

Judgment affirmed.

Whole Court sitting.

[fol. 74-1] IN COURT OF APPEALS OF KENTUCKY

JAMES E. WISE and RAY B. MOSS, Appellants,

v.

ALBERT BENJAMIN CHANDLER, etc., et al., Appellees

Appeal from the Franklin Circuit Court

OPINION OF THE COURT BY JUDGE STITES—October 1, 1937

This is an appeal from a judgment of the Franklin Circuit Court dismissing appellants' petition as amended on the ground of its alleged failure to state facts sufficient to constitute a cause of action. The suit was filed for the purpose of enjoining the Governor and other defendants from certifying to the Secretary of State of the United States, the Presiding Officer of the United States Senate, and the Speaker of the House of Representatives, copies of a resolution adopted at the Special Session of the General Assembly on January 13, 1937 (Acts, Fourth Special Session 1937, Chapter 30) purporting to ratify the so-called Child Labor Amendment to the Constitution of the United States on behalf of the State of Kentucky. In addition to the injunctive and general relief prayed, appellants asked for a declaration of rights concerning the [fol. 74-2] validity of the resolution of the General Assembly and of the status of the Amendment.

The petition was filed in the Franklin Circuit Court about 8 o'clock A. M. on January 15, 1937, bond was executed, and a restraining order was issued immediately against the defendants enjoining each of them from sending copies of the resolution to the Secretary of State, Presiding Officer of the Senate, or Speaker of the House. On the same day, but before he was actually served with a copy of the restraining order or summons in the suit, the Governor forwarded a certified copy of the resolution to the Secretary of State. It is not claimed that he knew of the pendency of this proceeding at the time of such action.

On the following day (January 16, 1937) appellants filed an amended petition in which they set out the action taken by the Governor since the filing of the suit, and they asked for a mandatory injunction to require him to notify the Secretary of State of the pendency of this proceeding and

that the notification then in the hands of the post-office for delivery to the Secretary of State was void and should be disregarded. No action was taken on this amended petition. Appellees, without questioning the right or capacity of appellants to bring the suit, filed a general demurrer to the petition as amended. The demurrer was sustained, and appellants declined to plead further. Their petition was dismissed, and this appeal followed.

On July 2, 1924, the Sixty-eighth Congress of the United States proposed the so-called Child Labor Amendment to the several States. We are not here concerned with the merits or demerits of the Amendment, but simply with the mechanical process of amending the Federal Constitution under Article V of that instrument providing, so far as pertinent to this case:

[fol. 74-3] "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, * * * which * * * shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress * * *."

During the year following the submission of the Amendment, in 1924, it was ratified by one State and rejected by three. In 1925 it was ratified by three additional States and rejected by an additional thirty-two. In 1926 the General Assembly of Kentucky adopted a resolution rejecting the Amendment, and its action was certified to the Secretary of State of the United States some six or seven months thereafter. One other State likewise rejected the Amendment that year. In 1927 Montana ratified the Amendment, although it had previously, in 1925, rejected it, and Maryland rejected it for the first time. No action at all was taken by any State, either one way or the other, during 1928, 1929, and 1930. In 1931 Colorado, after a previous rejection, ratified it. Again no action was taken in 1932, but in 1933 there was a general revival of interest in the question, and action either ratifying or rejecting it was taken in twenty-three States. Action was likewise taken in various States in each succeeding year thereafter. If a State which has once ac[illegible]on an amendment to the Federal

Constitution may act again and change its position thereon, then there were twenty-eight ratifications and twenty rejections standing at the date of the commencement of this action.

On December 23, 1936, the Governor of Kentucky issued a proclamation convening the General Assembly in Extraordinary Session for the purpose of considering certain enumerated subjects (Constitution of Kentucky, Section [fol. 74-4] 80) not including the proposed Amendment. On January 8, 1937, the Governor amended his call to include consideration of the Amendment, and the General Assembly thereupon adopted the resolution purporting to ratify the Amendment on behalf of the Commonwealth of Kentucky.

It is urged by appellants:

First. That the power reserved to the States by Article V of the Federal Constitution, to pass upon a proposal by Congress for an amendment of that instrument, when once affirmatively exercised, is exhausted and that the Kentucky legislature, having exhausted that power on March 24, 1926, by the adoption of a concurrent resolution of both Houses, affirmatively rejecting the Amendment in question, and having caused its action to be certified by the Governor of Kentucky to the Secretary of State of the United States, to the Presiding Officer of the United States Senate, and to the Speaker of the House of Representatives of the United States, had exhausted the power invoked by the Congressional proposal.

Second. That, including the rejection by the Kentucky legislature on March 24, 1926, the Amendment had then been affirmatively rejected by twenty-six States, in each instance by resolution of both houses of the legislature, that in twenty-one of those States the resolution has been duly certified to the Secretary of State of the United States and that the affirmative rejection of the Amendment by more than one-fourth of the States of the Union constituted a final and irrevocable decision of the referendum to the state legislatures of the Congressional proposal.

Third. That, in order to validate a proposed amendment as part of the Federal Constitution, ratification by three-fourths of the States must take place within such a reasonable time after its proposal as would make their action [fol. 74-5] an expression of the approval of the people,

sufficiently contemporaneous in that number of States to reflect the popular will in all sections of the country at relatively the same period (Dillon v. Gloss, 256 U. S. 368, 65 L. Ed. 994); that twelve years and seven months, which was the time that elapsed between the proposal of the Amendment by Congress on June 2, 1924, and the attempted ratification thereof by the Kentucky legislature on January 13, 1937, was not such a reasonable time; that at that time the Congressional proposal, if not conclusively defeated by the adverse action theretofore taken by the States, must, at least, be regarded as abandoned and that consequently said attempted ratification was of no effect.

Fourth. That the session of the Kentucky legislature at which the resolution of purported ratification was adopted was a special session and action upon the proposed Amendment was not one of the subjects mentioned in the Governor's proclamation convening that session.

It seems logically to follow from the provision in Article V of the Federal Constitution that the framers of that instrument contemplated that the effect of ratification or rejection by the States would be the same whether taken by the legislatures of the several States or by conventions held therein. "If an amendment to the Federal Constitution should be proposed by Congress, and submitted to State Conventions instead of the legislatures, the powers and disabilities of the two classes of bodies in respect to the amendment would, it is conceived, be precisely the same." Jameson, "A Treatise on Constitutional Conventions," 4th Ed., Sec. 586. In Hawke v. Smith, 253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 871, a case involving the adoption of the Eighteenth Amendment, the Court said:

"The proposed change can only become effective by the ratification of the legislatures of three-fourths of the States, [fol. 74-6] or by conventions in a like number of States. The method of ratification is left to the choice of Congress. Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people."

It was conceded in argument of this case at the bar that the proposal by Congress of an amendment to the Federal Constitution was analogous to the making of an offer for

acceptance or rejection under the law of contracts. It is unnecessary to speculate, with Webster, Clay, or Calhoun, as to whether or not the Constitution is itself a fundamental charter of government or a compact between sovereign states. It is sufficient for our purposes to concede that there is an analogy to the principles of contract law in the processes of amending the Federal Constitution.

So far as we have been able to discover, no writer on the subject has undertaken to defend the position that the delegates to a State Convention, elected and assembled for the single purpose of acting upon a proposed amendment to the Federal Constitution, could reject the proposed amendment and thereafter, having adjourned sine die, reassemble and adopt a resolution of ratification. Even if it be conceded that a State might reject an amendment and later, while the amendment is still before the people, change its position thereon, certainly this power could not logically be said to exist after an amendment has been rejected by more than one-fourth of the States and these rejections duly certified to the Secretary of State of the United States.

In Dillon v. Gloss, 256 U. S. 368, the Court, in speaking of Article V, said:

"We do not find anything in the Article which suggests that an amendment once proposed is to be open to ratifica- [fol. 74-7] tion for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purpose and spirit of the Article lead to the conclusion expressed by

Judge Jameson 'that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.' That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal."

[fol. 74-8] The functional identity of state legislatures and state conventions is further indicated in the opinion in Hawke v. Smith, supra, where Mr. Justice Day, speaking for the Court, said:

"Ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment."

We can find no logical point of difference in the ultimate result whether Congress chooses the one or the other mode of sounding the sentiment of the people in regard to a proposed amendment.

It is the prevailing, though not unanimous, view of writers on the question that a resolution of ratification of an amendment to the Federal Constitution, whether adopted by the legislature or a convention, is irrevocable. This conclusion seems inescapable as to the action of a convention called for the purpose of acting upon an amendment. When it has acted and adjourned, its power is exhausted. Since the "powers and disabilities" of the two classes of representative assemblies mentioned in Article V are "precisely the same," when a legislature, sitting not as a law-

making body, but as such an assembly, has acted upon a proposal for an amendment, it likewise has exhausted its power in this connection.

Logically, this view would accord finality to whatever action was taken, whether by convention or through the legislature. A contrary doctrine, however, to the effect that, while an act of ratification is final and irrevocable, an act of rejection is no obstacle to a subsequent ratification, has made its appearance in academic discussions of the subject. The theory was first advanced during the controversy which attended the adoption of the Civil War Amendments. Those Amendments were proposed during the period of reconstruction, and the question of the standing of the seceded States came under consideration. As early as July, 1861, the Congress had formally declared that, upon the part of the government, the war was being waged "to preserve the Union, with all the dignity, equality and rights of the several States unimpaired." But when that purpose seemed to have been accomplished through victorious armies, men in positions of power and influence took the singular position that the result of the war for the preservation of the Union was the destruction of the Union, and that consequently the seceding States were to be treated as conquered provinces. The governments which had been set up in the Southern States following the Amnesty Proclamation by President Lincoln were declared illegal, and the territory was divided into "military districts," each of which was put under the superintendence and control of a Major General.

[fol. 74-9]

The First and Second Reconstruction Acts were passed in March, 1867, over the vetoes of President Johnson. The first of these Acts recited that "no legal state governments or adequate protection for life or property now exist in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas and Arkansas," thus setting aside the governments which had been organized under Lincoln's Amnesty Proclamation. The Thirteenth Amendment, which was proposed February 1, 1865, had been ratified by many of those governments, to wit: Virginia, Louisiana, Tennessee, Arkansas, South Carolina, Alabama, North Carolina and Georgia. The Fourteenth Amendment, proposed June 16, 1866, was rejected by four of the Southern States in 1866 and by Vir-

ginia in 1867, all acting through legislatures which were parts of the governments set up under the Amnesty Proclamation. Thereafter, these governments were declared by Congress to have been illegal, and the adoption of the Four-
[fol. 74-10] teenth Amendment was accomplished by ratification by the "carpet bag" governments of Georgia, North Carolina and South Carolina, in July, 1868.

The adoption of the Thirteenth Amendment was almost a matter of course following the victory of the Union armies. New Jersey at first rejected this Amendment, but subsequently ratified it. However, its attempt at ratification occurred subsequent to the time when the Amendment had been adopted by three-fourths of the States, and it was not mentioned as one of the ratifying states in the proclamation.

As to the Fourteenth Amendment, at the time of Mr. Seward's first proclamation of its adoption, dated July 20, 1868, there were thirty-seven States in the Union, and the assent of twenty-eight States was required to make the Amendment a part of the Constitution. Twenty-five States ratified and made no attempt to reverse their position. Two States—Ohio and New Jersey—ratified and subsequently undertook to reject the Amendment. North Carolina and South Carolina ratified through their military governments after having rejected the Amendment through their "Amnesty Proclamation" governments. There were, therefore, twenty-nine ratifications, or one more than the number required for adoption of the Amendment. Secretary Seward, however, in his first proclamation, pointed out not only that New Jersey and Ohio had attempted to withdraw their ratifications, but also that in six Southern States (Arkansas, Florida, North Carolina, Louisiana, South Carolina and Alabama) the resolution of ratification had been adopted "by newly constituted and newly established bodies avowing themselves to be, and acting as the legislatures respectively of" those States. He said that it was "deemed a matter of doubt and uncertainty" whether the later resolutions of Ohio and New Jersey were "not irregular, invalid and therefore ineffectual for withdrawing the
[fol. 74-11] consent of the said two States." His proclamation then continued thus:

"And whereas the twenty-three States first hereinbefore named, whose legislatures have ratified the said proposed

amendment, and the six States next thereafter, named, as having ratified the said proposed amendment by newly constituted and established legislative bodies, together constitute three-fourths of the whole number of States in the United States;

"Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the Act of Congress approved the twentieth of April, eighteen hundred and eighteen, hereinbefore cited, do hereby certify that, if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislature of those States which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned and so has become valid to all intents and purposes as a part of the Constitution of the United States."

This proclamation was made on July 20, 1868. Upon its being submitted to the Congress, that body, on the following day, July 21, 1868, adopted a resolution which, after reciting that the twenty-nine States mentioned above had ratified the Amendment, affirmed "that said Fourteenth Article is hereby declared to be a part of the Constitution of the United States and it shall be duly promulgated as such by the Secretary of State." It happened that on that very day Georgia had withdrawn her former rejection of the Amendment and had ratified it and, although this State was not mentioned in the Congressional resolution, it was included in Secretary Seward's second proclamation of July 28, 1868. Thus, at the time of the second proclama- [fol. 74-12] tion, there were ratifications by thirty States, if the Congressional method of counting the vote was correct. That method was to resolve all doubts in favor of ratification. States that had ratified and then rejected and States that had rejected and then ratified were all counted as ratifying.

The ratifications of New Jersey and Ohio were not essential to the adoption of the Amendment, provided the votes of the two Carolinas and of Georgia could be counted on that side. But even with Georgia in the fold, it was still necessary to have either New Jersey or Ohio or one of the

Carolinas. Congress, and Secretary Seward under its instructions, took them all and thus had two more than the required three-fourths.

It was in this tense atmosphere of reconstruction that Judge Jameson wrote his book, and it was from this nonjudicial precedent that he drew the surprising conclusion that consent to an amendment once given, no matter how hastily and inconsiderately, is irrevocable, but that its affirmative rejection, no matter how deliberate or how often repeated, may at any time be overridden. Upon this theory, a proposal for amending the Federal Constitution can never be defeated, since votes of rejection, though affirmative in form and buttressed with statements of the reasons for rejection, are treated as no votes at all, having no more effect than complete inaction on the part of the rejecting State.

The first person to suggest this doctrine was Governor Bramlette, of Kentucky, in his message to the General Assembly of March 1, 1865. The Assembly had rejected the Thirteenth Amendment to the Federal Constitution and sent it to the Governor for his approval or disapproval, conceiving that this was necessary, as in the case of legislation. The Governor, although favoring the Amendment, declined to return the resolution of rejection with his dissent, on the ground that the action of the Legislature was complete without his approval. In his message to that [fol. 74-13] effect, he took occasion to express his dissatisfaction with the action taken by the legislature and his opinion that its rejection did not preclude future ratification, saying: "Nothing but ratification forecloses the right of action. When ratified all power is expended. Until ratified the right to ratify remains."

But it was Judge Jameson who gave wide currency to this view in his work on "The Constitutional Convention." In the first edition of his book he said that, "although the subject (was) not free from difficulties," it was "probable" that Governor Bramlette's view would be accepted as the true construction of Article V, adding (Sec. 563) that:

"it could hardly have been unintentional that the contingency of rejection of the proposed Amendment by one or more States was left unprovided for and it would seem a stretch of power to interpolate into that article a provision

that, if rejected by one legislature or by three-fourths or even all State legislatures, such action should be taken to be definitive."

At the time of the publication of the first edition of Judge Jameson's book, the Fourteenth Amendment had not been proposed by Congress, but, in subsequent editions of his book, he leans heavily upon the action of Congress in accepting the votes of Ohio and New Jersey upon that Amendment, as described above.

So far as concerns the precedent set by Congress in connection with the adoption of the Fourteenth Amendment, its view is authority for the proposition that a State which has once ratified an amendment has exhausted its power and cannot thereafter reverse its stand. On the other hand, when it comes to the counting of the votes of Georgia and the two Carolinas, the avowed justification of this was not that those States could ratify despite their [fol. 74-14] previous rejections, but that their previous rejections were void because the then governments of those States were illegal and their legislatures were without authority to act at all.

The only ground put forward by Judge Jameson in the first edition of his book for the theory that a vote of rejection may be disregarded at any time is that, since Article V does not mention the rejection of a proposal for amendment, but mentions only ratification, it must be concluded that rejections were not in contemplation and consequently were not authorized. The language of Article V is that a proposed amendment shall become part of the Constitution "when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof." Judge Jameson says that it would be "a stretch of power to interpolate into that Article a provision that, if rejected by one legislature or by three-fourths or even all State legislatures, such action should be taken to be definitive." Certainly, had the framers of the Constitution entertained so unique a theory, they would have adopted language more clearly expressing their intention. It is hardly consonant with common sense to say that an amendment, once proposed for ratification, could never be rejected. The very purpose of proposing an amendment must be to poll the sentiment of the various States on the question. It would be an anomaly if that sentiment could be expressed effec-

tively in only one way. We can see no reason for attaching less dignity to the expression of the sovereign will of the State in rejecting an amendment than is attached to its action in ratifying such an amendment. It would be a singular thing to say that rejections are allowed, but when they occur they are to be treated as non-existent. Evidently, the Supreme Court of the United States did not accord with this view when it said, in the National Prohibition Cases, 253 U. S. 350, 386:

[fol. 74-15] "The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification *or rejection* of amendments to it." (Italics ours.)

In a speech delivered in the United States Senate on February 22, 1870, regarding the adoption of the Fifteenth Amendment, Senator Garrett Davis, of Kentucky, in replying to an argument advanced by the Senator from New York, said (Congressional Record, Forty-first Congress, Second Session, p. 1480):

"The honorable Senator's argument upon the first branch of his proposition I thought powerful and conclusive; but when he contended that this power of a State to act upon a proposed amendment to the Federal Constitution was a power to ratify, and imported no power to reject, I think he was widely from the true principle and widely from logic. How long shall it be before a Legislature that has rejected it? How long shall it be an open question? Twenty years? Fifty years? How long? Where is there any principle or provision of the Constitution that would so protract the question before a State convention or State Legislature acting upon the subject of a proposed amendment? There is none. There is not a syllable of language from which such a power can be inferred. It does not exist. When the subject is submitted to a State for its action, whether it be by its Legislature or its convention, it is for a single action; it is but for one action. The action of acceptance is no more extensive than the action of rejection; it has no more validity or effect. The effect of either mode of action is to exhaust the power of the State over that proposed amendment, and it can never come before that State again in any form whatever unless it comes

before it in the form of a new proposition to amend the Constitution."

[fol. 74-16] It is true that Mr. David K. Watson, in his work on the Constitution, Volume II, p. 1318, argues in support of the position that a rejection of an amendment by a State is not final, but may be followed by ratification. He suggests that there is an analogy between the processes of amending the Constitution and that of making laws, and would apply to the former the familiar rule that one legislature may repeal any act of a former legislature. It seems obvious that such an analogy will not hold. Logically, this view would require that no more finality be accorded a ratification than a rejection. As pointed out by Mr. Justice Day in Hawke v. Smith, supra, action taken by a State legislature under the Federal Constitution is not legislation within the proper sense of that word. This is made very clear in an analogous situation presented to the United States Senate concerning the contest over the election of Senator Faulkner of West Virginia in 1887. It may be said in passing that the opinion of the Senate Committee in this matter is likewise a complete answer to appellants' fourth contention set out above.

Mr. Daniel B. Lucas was appointed on March 5, 1887, by the Governor of West Virginia to the seat in the Senate left vacant by the expiration of the term of Senator Johnson N. Camden on March 3, 1887. On December 5, 1887, the President Pro Tempore of the Senate presented the certificate of the appointment to hold the office "until the next meeting of the legislature of said state having authority to fill" the vacancy occasioned by the expiration of Senator Camden's term. On the same day the President Pro Tempore also laid before the Senate the credentials of Charles A. Faulkner, chosen by the legislature of West Virginia a Senator for the term beginning March 4, 1887. Mr. Lucas protested against these latter credentials, and Senator Hoar moved that Mr. Faulkner's case be sent to [fol. 74-17] a committee for investigation, and it was so ordered. The report of this committee may be found in Hinds' Precedents of the House of Representatives, Volume I, Section 632. The report sets out the provision in the Constitution (Article I, Sections 3 and 4) for electing Senators. Section 3 of Article I provides that if vacancies occur while the State legislature is not in session, the Ex-

ecutive may make temporary appointments until the next meeting of the legislature. The report stresses the point that each House shall be the judge as to whether one has the proper credentials to hold his seat. Congress is given the power by the Constitution to prescribe the time and manner of electing Senators, citing the case of Ex Parte Siebold, 100 U. S. 371.

The constitution of West Virginia provided that, "The legislature shall assemble at the seat of government biennially, and not oftener, unless convened by the governor. The first session of the legislature after the adoption of this constitution shall commence on the third Tuesday of November, 1872; and the regular biennial session of the legislature shall commence on the second Wednesday of January, 1875, and every two years thereafter on the same day (Art. VI, Sec. 7)." Article VII, Section 7, is the section that is similar to Section 80 of the present Kentucky Constitution. It reads, "The governor may, on extraordinary occasions convene, at his own instance, the legislature; but, when so convened, it shall enter upon no business except that stated in the proclamation by which it was called together."

Mr. Faulkner was not elected to the Senate until a special session of the legislature was called by the governor, soon after the 5th of March, 1887. This session was called to consider eight specified objects, none of which was the election of a senator. Having set forth the facts, the report then discusses two questions arising in the case.

[fol. 74-18] First, as to the action of the legislature. Was the body which sat in pursuance of the governor's call a legislature in the constitutional sense? Mr. Lucas claimed that since it was not called to elect a Senator, if it did elect a Senator then it was not a legislature, for it was violating the Constitution of the State. However, the Senate committee did not agree with this argument, for, it pointed out, the body passed upon legislation concerning the eight specified objects, as a legislature, and it could surely pass upon a matter or duty imposed upon it by the Constitution of the United States, which is the supreme authority of the land. It points out that where the State Constitution conflicts with the Federal Constitution, the latter must prevail. To the first question, the committee held that the special session of the legislature could elect Mr. Faulkner even though such an election was not one of the purposes for calling same.

The second question was as to the qualifications of Mr. Faulkner. The issue on this point is not pertinent here.

The report, which was evidently written by Senator Hoar, an able constitutional lawyer, says:

"It is claimed by Mr. Lucas that, as this body was not permitted to enter upon any legislative business except such as related to the eight matters set forth in the call, it was not a legislature, but was a body deriving its power from the will of the executive, and so was exerting a certain executive or quasi-executive function something like that which is exercised by the Senate in giving its assent to the nomination of public officers.

"But it seems to us that this view cannot be supported. In the first place, the body is expressly declared by the constitution of West Virginia itself to be a legislature. In the next place, the function which it exercised in making [fol. 74-19] enactments upon the eight great subjects mentioned in the call of the governor is clearly a legislative function. • • •

"It is difficult to conceive of any definition of the word 'legislature' which would not include a body capable of passing and actually passing such enactments as these (subjects in call). They can be binding on the people of the Commonwealth only as legislation. They would be subject to be construed and enforced by the courts of that State only in their character as laws.

"But it seems to the committee that the construction of the State constitution upon which the above argument is based, is one which will not bear examination. When that constitution provided that the legislature so convened in extraordinary occasions 'should enter upon no business except that stated in the proclamation by which it was called together,' the people must be presumed to have had in mind business to be transacted under authority of the State constitution, and not to have intended to prohibit the performance of duties imposed upon it by the supreme authority of the Constitution of the United States.

"If the argument be sound that a legislative body which is prohibited from entering upon certain classes of business, or which is confined to certain classes of business clearly legislative in their character, is no legislature in the constitutional sense, its logic would require us to declare that the legislature of every State whose bill of rights excludes

it from large domains of legislation is no legislative body. If, under the same provision of the Constitution of the United States, the act of Congress had fixed a day for holding elections for Representatives to Congress, and the State Constitution or laws should prohibit the assembling of the people for such elections on the day so fixed, it would, we suppose, be held clear that the act of the State would be void and the authority of the act of Congress would prevail.

"We cannot see any difference between such prohibition of a State constitution applicable to the constitutional electors of Senators, who are members of the State legislature, [fol. 74-20] and the constitutional electors of representatives, who are a body of electors authorized to vote for members of the most numerous branch of the State legislature.

"We are therefore clearly of the opinion that the election of Mr. Faulkner at the special session of the legislature of West Virginia was valid."

If further authority is necessary to rebut the theory of Mr. Watson that there is an analogy between the action of the State legislature in performing its functions under the Federal Constitution and ordinary legislation, we find it in the cases cited by appellees for the following proposition quoted from their brief:

"The ratification of a proposed amendment to the Federal Constitution by the State Legislature *is not legislation* and does not require any previous proclamation for consideration and action, if the Legislature is in fact in session, whether General or Special". (Italics ours.)

Appellees refer to the following cases supporting this proposition:

Leser v. Garnett (1922), 258 U. S. 130, 42 S. Ct. 217.
National Prohibition Cases, 253 U. S. 350, 386, 40 S. Ct. 486.
State v. Sevier (1933), 333 Mo. 662, 66 S. W. (2d) 895.
State v. Sevier (Certiorari denied), 54 S. Ct. 132.
Pryor v. Nolan, 68 Colo. 286, 188 P. 729, 731.
Opinions of Justices, 118 Me. 544, 107 Atl. 673.

We think the conclusion is inescapable that a State can act but once, either by convention or through its legislature, upon a proposed amendment; and, whether its vote be in

the affirmative or be negative, having acted, it has exhausted its power further to consider the question without a resubmission by Congress. If we should be in error in this conclusion—and, of course, our position on this question [fol. 74-21] must bow to the views of the Supreme Court of the United States when they are expressed thereon—there are nevertheless the additional questions as to whether or not rejection by more than one-fourth of the States at one time did not terminate the "offer" of the Amendment by Congress, and whether or not, under the decision of the Supreme Court in Dillon v. Gloss, supra, more than a reasonable time had elapsed between the submission of the Amendment and the alleged ratification by Kentucky. Accepting the analogy between the submission of an amendment by Congress and the making of an offer, under the principles of the law of contracts, the conclusion that the Amendment was no longer before the States at the time of the purported ratification by Kentucky in 1937 seems inevitable. The proposition is succinctly stated in a letter published in the July, 1934, number of the American Bar Association Journal, written by Mr. Frank W. Grinnell, of the Boston bar. He says:

"Since the Constitution requires a vote of three-fourths of the several states to ratify an amendment, it requires only one state more than one-fourth to defeat ratification and it seems to follow as a matter of common sense and orderly procedure from the decision just referred to (Dillon v. Gloss) that the rule must work both ways and that when thirteen states (one more than one-fourth of the forty-eight states) have voted not to ratify an amendment it is no longer pending, but is defeated until Congress sees fit to resubmit it. Otherwise, a state could change its mind in one direction after a final vote of the necessary number of states, but not in the other direction.

"In the case of the Child Control Amendment, not only thirteen but twenty-six states voted not to ratify. I submit that it was clearly defeated. If this is not so, states might be subjected to constant agitations over defeated [fol. 74-22] amendments after the citizens considered them defeated and w[illegible] off their guard.

"When an amendment is submitted by Congress, the process of ratification is really a debate among the several states. If it is true, as I believe it to be, that at this time

the Child Control Amendment is no longer before the states, the action of those states which have attempted to ratify it during 1933 has no legal effect.

. . . . . .

"If we are to have deliberative government in this country on such important matters as amendments to the Constitution of the United States, is it not essential that we should maintain the rules of orderly procedure similar to those in our legislatures under which after a matter has been definitely defeated by the requisite majority it can not be considered again unless it is resubmitted in the usual way,—in this case by Congress."

In addition to the fact that the Amendment before us was rejected by more than one-fourth of the States—indeed, it appears from the record that twenty-one of the States in 1926 had not only rejected the Amendment, but the resolutions thereon were duly certified to the Secretary of State of the United States, and thirty-seven States in all had actually rejected—there is the question, noted in Dillon v. Gloss, supra, from which we have quoted above at length, of whether or not more than a reasonable time has elapsed since the original submission of the Amendment. Assuming that the rejection of the Amendment by more than one-fourth of the States did not ipso facto terminate the proposal and require a resubmission by Congress if further action was to be taken, it may at the very least be doubted if twelve and a half years is a reasonable time within which to act. Leaving out of consideration the first ten Amendments to the Constitution (the "Bill of Rights"), the time required for the adoption of the eleven succeeding Amendments was respectively as follows:

[fol. 74-23] Eleventh: 2 years, 4 months.
Twelfth: 9 months.
Thirteenth: 10 months.
Fourteenth: 2 years, 1 month.
Fifteenth: 1 year, 1 month.
Sixteenth: 3 years, 6 months.
Seventeenth: 1 year, 2 weeks.
Eighteenth: 1 year, 1 month.
Nineteenth: 1 year, 2 months.
Twentieth: 11 months.
Twenty-first: 9 months, 2 weeks.
Average Time: 1 year, 6 months.

Since the decision in Dillon v. Gloss, supra, two proposals for amending the Constitution (since adopted as the Twentieth and Twenty-first Amendments) each contained a limitation of seven years. The power of Congress thus to fix a reasonable limitation upon the time within which an amendment should remain before the States having been sustained in Dillon v. Gloss, and Congress having attached a limitation of seven years to its submission of both the Twentieth and Twenty-first Amendments, it does not seem improper to conclude that this is the period considered by that body to represent a reasonable time for the States to act. Certainly, seven years is not too short a time, in view of the history of previous amendments as shown in the table above. Taking the instant Amendment itself, action had been taken in forty-two of the forty-eight States by the close of 1927. The fact that but one State (Colorado in 1931) acted between 1927 and 1933 indicates very strongly that general sentiment considered the proposition to be no longer before the people. It seems clear that the "reasonable time" during which the "offer" remained open necessarily expired at some time during the period of apparent abandonment between the end of 1927 and the revival of interest in 1933. Certainly, by any yardstick, more than a reasonable time had elapsed by January, 1937.

[fol. 74-24] Concluding, as we must, that the petition in this case has stated a cause of action, we are nevertheless confronted with the proposition urged on behalf of appellees to the effect that, since the Governor's certification to the Secretary of State of the United States is fait accompli, the case is moot to the extent that the Court can grant no effective relief, even though it should proceed to make a declaration of rights under Civil Code Section 639a, et seq. Appellants justify the procedure which they have adopted in presenting the question as to the validity of the Amendment under the decision of the Supreme Court of the United States in Leser v. Garnett, 258 U. S. 130, 42 S. Ct. 217, 66 L. Ed. 505, to the effect that an official notice to the Secretary of State, duly authenticated, that the legislature of a given State had adopted a resolution of ratification of a proposed amendment to the Federal Constitution, is "conclusive on him" and that his proclamation certifying that he had received such notices from three-fourths of the States and that the Amendment in question had therefore become a part of the Federal Constitution is "conclusive upon the courts."

Under this decision, the claimed ratification of an amendment cannot be challenged after the proclamation by the Secretary of State of the United States. Obviously, therefore, if there is to be a judicial determination of the validity of the action taken by any State, it must occur during the interim following the action by such State and the date of proclamation by the Secretary. It is not questioned but that the Governor acted in a purely ministerial capacity in forwarding the certified copy of the resolution of the General Assembly, and it has been held that the Secretary of State acts ministerially in proclaiming an amendment under Section 205 of the Revised Statutes of the United States (U. S. C. A., Title 5, Section 160). United States v. Colby, 265 Fed. 998, 49 App. D. C. 358 (a writ of error dismissed, [fol. 74-25] 257 U. S. 619). The Amendment becomes effective upon its ratification by the thirty-sixth State and does not await a proclamation by the Secretary of State to give it vitality. Dillon v. Gloss, supra. It is apparent, therefore, that the action of the Governor in forwarding the resolution of the General Assembly to the Secretary of State did not of itself add anything to the action of the General Assembly other than to make a record which was prima facie evidence of the action taken by Kentucky. It would be surprising to learn that a Governor might irrevocably commit his State to the adoption or rejection of a constitutional amendment by a mere certification to the Secretary of State. We do not think that such a rule is to be implied from the decision in Leser v. Garnett, supra. Section 205 of the Revised Statutes of the United States (U. S. C. A., Title 5, Section 160) provides:

"Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, *according to the provisions of the Constitution,* the Secretary of State shall forthwith cause the amendment to be published, with his certificate, *specifying the states by which the same may have been adopted,* and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States." (Italics ours.)

Surely, the Secretary of State must determine whether or not the certification by the Governor is "according to the provisions of the Constitution." If, as we conceive, the

Amendment was no longer before the States at the time of the purported adoption by the General Assembly of Kentucky, then the certification by the Governor was a nullity and could and should be ignored by the Secretary of State. [fol. 74-26] If the certificate of the Governor showing the purported ratification by the State of Kentucky cannot be impeached, then, by the same token, the certificate of the Governor to the resolution of rejection, passed in 1926, and thereafter duly forwarded to the Secretary of State, is likewise not subject to question, and it would therefore be the duty of the Secretary of State to ignore the second certification. In both Leser v. Garnett, supra, and United States v. Colby, supra, the official notices in the Department of State were apparently regular in form and unchallenged at the time when the proclamation of the Secretary was made. It was held that those notices had created a presumption conclusive upon the Secretary of State that the legislatures of the States from which they came had duly adopted resolutions of ratification. Certainly this presumption would attach to the record of rejection no less than the subsequent record of purported ratification, and it seems clear that a decision by a court having jurisdiction of the question would be binding as to the validity or invalidity of the record concerning a particular State.

In Miller v. Johnson, 92 Ky. 589, 18 S. W. 522, certain voters and taxpayers, suing on behalf of themselves and others similarly interested, brought an action against the public printer and the Secretary of State to enjoin the former from printing the State Constitution just promulgated by the Constitutional Convention of 1891 and the latter "from preserving it in the State archives as the Constitution of the State; and also asked that it be adjudged not to be such, but spurious and invalid." In determining that case, the Court said:

It is urged upon the part of the appellees, that the appellant's suit is based upon a speculative idea of injury; and that no such special, particular and substantial damage is impending to them as to authorize it. Also that the action [fol. 74-27] does not lie against the appellees because the printing or preservation of the instrument will not add to or detract from its validity. We waive the consideration of these objections, because even if entitled to it, the importance of this controversy to the State requires a decision upon the merits."

Appellees have waived any question as to the right of the appellants to maintain this suit. Board of Park Commissioners v. Speed, 215 Ky. 319, 285 S. W. 212, and, aside from this, "the importance of this controversy to the State requires a decision upon the merits." The fact that the Governor certified the resolution to the Secretary of State after this suit was filed did not deprive the courts of the jurisdiction already attached to determine the controversy and to make a declaration of rights under Civil Code, Section 639a et seq. McHugh v. Louisville Bridge Co., 23 Ky. Law Reporter, 1546, 65 S. W. 456; St. L. & S. F. R. Co. v. Cross: 171 Fed. 480; 32 C. J. 77.

In 32 C. J. 24 the text, supported by numerous authorities, says:

"Where defendant has fully completed the act sought to be restrained, after the filing of the bill but before the issuance of any order or decree, the court has power to compel by mandatory injunction the restoration of the former condition of things, and thereby prevent the gaining of an advantage by reason of the wrongful act, provided plaintiff has been guilty of no wrongful acquiescence or delay. Where defendant does an act which the bill seeks to enjoin, he acts at his peril and is subject to the power of the court to compel a restoration of the status, or to grant such other relief as may be proper under the particular circumstances of the case."

Under the circumstances here presented, a mandatory order directing the Governor to notify the Secretary of [fol. 74-28] State of the decision of this Court would be entirely unnecessary. The Court itself, with equal effect, may direct its clerk to certify a copy of its judgment concerning the status of the Amendment without the necessity of directing action by a co-ordinate branch of the State Government.

Since the question is before us on demurrer to the petition, and appellees may desire to assert some further defense, the case will have to be returned to the Circuit Court with directions to overrule the demurrer to the petition, and for such further proceedings as are not inconsistent with the views herein expressed.

Judgment reversed.

Whole Court sitting.

[fols. 75-76] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed March 10, 1938

To the Clerk of the Above Entitled Court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a writ of Certiorari in said cause, the transcript will consist of:

The record on appeal in said cause;

The opinion of the Court of Appeals of Kentucky;

All journal entries contained in the records and proceedings of the Court of Appeals of Kentucky relating to said cause;

The final judgment and decision of the Court of Appeals of Kentucky in said cause;

The judgment and decision of the Court of Appeals of [fol. 77] Kentucky in the cause styled Wise, et al. v. Chandler, et al., decided October 1, 1937, which shall be attached as an appendix to your record;

A copy of this Præcipe;

Your certificate to the record that it is a complete record in said cause.

Dated this 10th day of March, 1938.

J. W. Jones, Assistant Attorney General, Attorney for Appellants.

[fol. 78] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 79] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME—Filed March 17, 1938

Upon consideration of the application of counsel for the petitioners it is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause is extended to and including March 31st, 1938.

J. C. McReynolds, Associate Justice of the Supreme Court of the United States.

Dated this 17th day of March, 1938.

[fol. 80] [File endorsement omitted.]

[fol. 81] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 11, 1938.

The petition herein for a writ of certiorari to the Court of Appeals of the Commonwealth of Kentucky is granted, and the case is assigned for argument immediately following No. 796.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.